UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| GEORGE ALBERT CURRY,<br><br>Appellant,<br><br>vs.<br><br>LAWRENCE E. WILSON, Warden,<br>California State Prison,<br>San Quentin, California,<br><br>Appellee. | ) | NO. 22030 |

# A P P E L L E E ' S  B R I E F


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APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in this Court when, as here, a certificate of probable cause has been issued.

## STATEMENT OF THE CASE

Appellant appeals from the order of the United States District Court for the Northern District of California, dated June 2, 1967, in the proceeding entitled Curry v. Wilson, No. 45068. The order is officially reported at 269 F. Supp. 9 (N. D. Cal. 1967).

### A. Proceedings in the state trial court.

By indictment, appellant was accused by the Grand Jury of Orange County, California, of a violation of section 187 of the California Penal Code in that on October 6, 1959, he did wilfully, unlawfully and feloniously, with malice aforethought, murder police officer Myron Trapp (CT 3).* Appellant was tried before a jury in 1960 (CT 3).

The prosecution demanded a conviction of first degree murder (RT 1102-1104). The defense theory was that appellant was intoxicated at the time of the killing and that there was no deliberate, premeditated and intentional taking of a human life (RT 51, 1127-1130). The jury, after fourteen days of trial, returned a verdict of second degree murder (CT 112).

The following facts were developed at the trial, the transcript of which was lodged in the District Court:

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*CT refers to Clerk's Transcript of appellant's appeal in the state court; RT refers to Reporter's Transcript of the appeal in the state court; CTA will refer to the Clerk's Transcript of the appeal in this Court.

PROSECUTION:

At about 2:55 p.m. on October 6, 1959, Sergeants Kenneth J. Runyon and Myron Trapp were at the Garden Grove Police Department (RT 52). A call was received concerning a man in a house with a gun (RT 72). The two police officers drove to a residence on Nelson Street in Garden Grove (RT 53). As they arrived at the location, Sergeant Runyon removed the automatic shotgun from the locked dash of the squad car. Sergeant Trapp parked in front of the next building south of the residence. An apartment house was under construction there (RT 54). Fifteen or twenty persons were in the street. Two uniformed officers were at the rear of the apartment building (RT 55). Sergeant Trapp used the public address system on the car to talk to the occupant of the house (RT 57). He said, "You in the white house, the house is surrounded. We are police officers. Come out" (RT 58:6-8). He then gave a count-down of ten to give the occupant time to come out. Sergeants Trapp and Runyon approached the house from the gate, up the driveway, crouching low, trying to minimize the size of the target (RT 58-59). Sergeant Runyon went to the northeast corner of the house at the front porch, while Trapp arrived at the north side of the house at the kitchen door, beyond range of Runyon's vision (RT 59). Runyon heard a commotion at the kitchen door (RT 60). Sergeant

Jacobs had also approached that door (RT 168). Trapp knocked and yelled, "We are police officers." He said, "Come out of the premises unarmed with your hands up" (RT 169: 17-19). They beat on the house one more time and pushed the door open (RT 169). Sergeant Jacobs saw the appellant seated on the couch with a rifle on his lap. Appellant raised the rifle up to his shoulder and pointed it at Jacobs who was dressed in full uniform. The sergeant yelled (RT 170, 197). He suggested that Trapp hold on the corner while he called for assistance and for tear gas (RT 171). Runyon saw Trapp come from the kitchen door in a wide arc to the rear of him, around the sidewalk. Trapp yelled to Runyon to get away from the door, as the man was approaching it (RT 60). The sharp report of a rifle was heard next, accompanied by the tinkling of glass breaking. Trapp dropped his gun and walked across the yard, as if he had been hit (RT 62). He walked across the lawn, half on his knees and half on his feet, for six feet or so before he fell flat on the ground (RT 63). Trapp yelled that he had been hit. Runyon looked toward the house and saw a shadow through the kitchen window; he shot twice (RT 64).

One officer climbed in a window and saw the appellant standing in the doorway of the bedroom. He had a rifle in hand, pointing downwards. The policeman said, "I am a police officer. Drop the gun" (RT 298:2-3).

Appellant pulled the gun up and fired. The officer felt a sharp sting in his left hand and went backward out the window (RT 297-299).

Officer Roach fired some shots into the rear of the house (RT 66). A voice yelled from inside, "Don't shoot, don't kill me, I surrender" (RT 175:14-15). Appellant came out, his hands up straight over his head (RT 175). Again he asked not to be shot (RT 176). Jacobs said, "Keep your hands high over your head. Walk very slowly onto the porch" (RT 177:2-3). And he did. Appellant came into the open. The officers took him into custody (RT 177-178). Appellant had some blood on his forehead (RT 69, 139).

An autopsy was performed on the victim (RT 245). A bullet passing through the body had caused death (RT 262).

Alijandro R. Alcala, a cement mason, was working next door to appellant's home on October 6, 1959 (RT 333). At 2:00 p.m., while he was working on an apartment building, he heard a shot and saw some plaster by his right leg (RT 336). He saw a hole in the wall, three feet off the ground and four feet from him (RT 337). While he showed this to a coworker, he heard a second shot, 10 inches from the first one (RT 338). The police arrived five to seven minutes later (RT 34, 341, 411).

After the homicide, the house was entered to see if anyone else was there (RT 457). No one was found inside (RT 458).

When appellant was put in the car he was heard to say, " I know what I have done and I am sorry" (RT 459:21).

On the ride to the police station appellant kept repeating: "I didn't mean to kill that police officer, honestly, believe me, I know what I have done, but I had no intention of doing it. I know what will happen to me, I'm done" (RT 536).

About 3:30 p.m. the Garden Grove Chief of Police talked to the appellant (RT 474). The chief went to a cell and asked appellant if he was the man who shot the officer. Appellant said, "No, I shot at some construction workers who were dumping trash on my yard" (RT 474:22-23). Appellant was taken to another room where there was further conversation, recorded on tape (RT 475). Appellant had very definitely been drinking. He was intoxicated but not drunk (RT 476). In the tape appellant said he just wanted to scare the construction workers (RT 486). He said he just shot in the air. He was sorry he did it and, "If I am wrong I want to pay . . . full penalty" (RT 492). The full tape is reported at pages 481-494 of the Reporter's Transcript, and much of it contains assertions of faulty recollection and

expressions of persecution by the world generally.

Appellant was interrogated by Deputy Sheriff John R. Baker and Sergeant Rios at 7:30 or 7:45 p.m. that day. Appellant was interviewed for four and one-half hours. No threats or promises were made (RT 201/c). What he said was free and voluntary. At the outset of the interview appellant made the following remarks:

> "Mr. Curry said that he left for work about 7:00 a.m. on the 6th; he was picked up by his foreman, Mr. Arnold, and taken to a roofing job; on the way to the roofing job Mr. Curry said that they stopped and bought a fifth of Gallo Wine, and upon arriving at the roofing job they learned that the inspectors had not been out to inspect the job; therefore the roofing job was delayed, and that while they were on the job that he and Webb drank this fifth of wine, or he and Arnold, pardon me. They remained there until about 10:00 a.m. that morning and decided to go back to Curry's house. On the way back they again stopped and Curry said that he had bought another bottle of port wine. At this time there was a third party, a Mr. Webb with them, and when they arrived at Curry's house, shortly after Webb wanted to go home and Mr. Curry said that he and Mr. Arnold then drove him to his home and returned. They were only gone a short time. They drank this fifth that they bought on the way back to the house, and about 12:00 o'clock Mr. Curry said that he heated up four tamales and that he ate two and also Arnold ate the other two. Then he said that Arnold left about 2:00 o'clock and from that point on Mr. Curry said he could not recall what happened" (RT 201/d, line 23; p. 201/e, line 18).

During this subsequent interview, appellant's recollection improved (RT 201/f). He said:

"As we talked to Mr. Curry he then -- he then said he recalled going to his bedroom to the closet and taking a .22 rifle from the closet. Mr. Curry then said he went to his dresser drawer and removed about eight or ten shells and loaded this .22 rifle. At this time Mr. Curry stated that he had trouble with the workmen building the apartment on the adjoining property; that the workmen were scattering scrap building material and pieces over the property line onto Mr. Curry's property. And at this time Mr. Curry said he fired two shots out of the bedroom window at the workmen. He stated he didn't intend to hit them but, more or less, to scare them. Then he said -- Mr. Curry said he put the rifle on the bed, went back to the living room and watched the World Series baseball game; shortly after this he heard several voices outside around his house, and at this time he went back to the bedroom, picked up the rifle and brought it into the living room and sat on the davenport.

"Mr. Curry said that following these voices he saw a figure through his glass front door of a person on the front porch; at this time, he said, he lifted the rifle up and fired at this figure.

"We then asked -- Sergeant Rios then asked Mr. Curry if he recalled the events that followed this, and Mr. Curry stated that he could not recall" (RT 202:1-24).

A tape was made of the last part of the interview (RT 208).

A rifle was found on the floor of the living room (RT 549). A wine bottle was under the coffee table (RT 550). Three empty wine bottles were in the kitchen waste paper basket (RT 563). In the bedroom another rifle lay on the foot of one of the beds (RT 551). It was loaded (RT 552) as was the first (RT 554).

The mechanics for loading both weapons are essentially the same (RT 555). The procedure was explained as follows:

> "A The gun is designed to be loaded through the magazine by removing the magazine follower rod far enough to allow the opening in the middle section of the magazine to be exposed, into which the shells are dropped base toward the receiver. The magazine is filled, the follower rod is then reinserted and locked into place.
>
> "Q And what are the mechanics of getting a shell into the chamber, then?
>
> "A In order to feed a shell from the magazine into the chamber the forestock, which is the grip under the barrel of the gun, has to be moved to the rear, which opens the action and allows the shell to be placed in position so that when the forestock or pump is returned, that shell is fed into the chamber of the rifle" (RT 552, 553).

Two empty shells and one live shell were found on the bedroom floor (RT 558-559). In the living room two shell casings were found (RT 560).

The bullet found in the victim's body was identified as a 22 Winchester Rimfire bullet (RT 565). Appellant's weapon was of the same make (RT 554).

The murder bullet was compared ballistically with the weapon in the house. The expert testified: "While the gross characteristics of the bullets were similar I was unable to find sufficient individual characteristics present to say that the bullet was fired from that weapon" (RT 574). There were several factors

that inhibited positive identification (RT 575). The casings on the floor, however, were fired through the weapon (RT 577). The weapon had been fired since it was last cleaned, but not the one in the bedroom (RT 580). The police attempted also to reconstruct the trajectory of the bullet fired at Sergeant Trapp. They examined defects in the screen, curtain and glass door. They inserted a probe through them and photographed the result establishing a line runing from the inside to the outside of the house (RT 605).

Much evidence was introduced on both sides as to the levels of intoxication by blood alcohol. The generally accepted figure for unsafely driving a car is .15. There is a distinction between this "under the influence" level and the level of intoxication. The low figure on intoxication is .25 and it runs to .28. (RT 627). The point at which a person will pass out runs from 3.5 to 4.2 (RT 628). [What is probably meant here is .35 to .42]. Appellant's blood alcohol was taken just prior to 5:05 p.m. (RT 624, 668). At this time appellant's face was red and bloated and his breath smelled of alcohol (RT 629). Of persons between .25 and .30 some are confused on time and place. Many are lucid. Most of them know what they have been doing (RT 630-631). Individuals with a drinking history develop a tolerance. A person without this tolerance may appear to be in worse

condition (RT 632, 672-673). Reason and judgment may be impaired between .25 and .30 (RT 633).

The test speciman taken at 5:05 p.m., had .257 percent blood alcohol (RT 668). At 1:48 the next morning the level had receded to .094 percent (RT 669).

To determine appellant's blood alcohol level at 3:00 p.m., the time of the killing, there are three possibilities. It could have been greater at 3:00 p.m. if the alcohol level in his system decreased. Or it could have remained the same. Or it could have been lower if the alcohol were consumed just before 3:00 p.m. so that it had not yet been absorbed into his system at the time of the killing (RT 674-676).

Fourteen ounces of one-hundred-proof whiskey would be needed to produce a level of .257 in a two-hundred-pound man (RT 676).

At .25 percent you would expect to find staggering; his manner of speech would be affected. The memory loss would probably increase (RT 690). Wine would have a slower ingestion rate than whiskey (RT 691). A person with a .25 or .28 would be able to load and fire a rifle. He would know he had a lethal weapon (RT 692).

DEFENSE:

According to his wife, appellant had been drinking for a year and a half. For two years before that he didn't drink at all (RT 707). He started drinking

again when he began to work with Jake Arnold, his foreman (RT 708). He drank quite a bit in the few days preceding the homicide (RT 708). He was not a quarrelsome person when drunk. The workmen next door had sprayed plaster on his mother-in-law but appellant had said nothing about it to them. They threw things on the porch and ruined a new chaise-lounge. Appellant just said to move it over (RT 712-713). He had a perfect reputation for peace and quiet (RT 719). She had heard however that he had been previously convicted of burglary and that his parole had been violated. She also had heard of another prior burglary conviction (RT 728-729).

Jake Arnold picked appellant up for work that morning. They had part of a bottle of wine at that time (RT 724). They got out to the job but were not permitted to work, as the job had not been inspected (RT 746). On the way they stopped and bought another bottle of wine (RT 747). They went back to the shop and drank (RT 748). They bought more alcohol and went to the appellant's house and drank, ate a tamale, talked and sat (RT 750, 751 752). Arnold arrived home at 2:00 p.m. and it took 20 or 25 minutes to go from appellant's house to his home (RT 764-5).

Appellant was examined by a doctor at 4:40 p.m. on October 6, 1959. There was a strong odor of alcohol; he swayed when seated (RT 785). However he had walked

in by himself, hands cuffed behind his back (RT 789).

Appellant testified on his own behalf. He related the drinking he had done. He couldn't "give a close estimate" but left the impression that it was a considerable amount. He ate "maybe two tamales" (RT 863-865). He had a "faint something there" as to shooting out the back window but not a clear picture. He did not recall loading guns. He vividly remembered drinking with Jake Arnold but recalled hearing no shots, not even those the police fired into the house. After sitting with Jake Arnold, his next recollection was of being in the District Attorney's office (RT 867). This was the Baker-Rios interrogation. He did not recall shooting out the front door (RT 867-868).

As to his taped admissions, he accounted for them this way:

> "A Well, after all, this being told repeatedly over and over and over -- I mean they placed me in the house, and so, I must have done it, I mean that is the answer I arrived at, I must have done it if I am the only one in the house. I am told that I done it, so that is -- that is the only knowledge I have of the incident" (RT 872).

He said Baker and Rios never hit him. "What did they do?" "Talked." (RT 874).

Appellant called to the stand an expert witness, a psychiatrist who had experience with alcoholics (RT 935). The prosecution had arranged to have him examine the

appellant for sanity (RT 938). The doctor determined there was legal sanity (RT 940). He spoke to him for an hour and a half to two hours (RT 943). The psychiatrist felt that appellant was not lying about his memory lapses:

> "A We believe in our work that if a person will cooperate and answer our questions, that we can tell if one is malingering or not, or lying, whatever you wish to say. If they answer all our questions. We can ask the same question from a psychological standpoint in many different ways, and we get our same conclusion. And I believe if anyone will answer us other than 'Yes' and 'No' and will give us an explanation the best they can, I don't believe it is possible to falsify about that. I don't think he was falsifying about his memory. Everything added up to it. He didn't try to lie to me in anything that I could find. I believe that he definitely had a memory loss." (RT 946-947).

The doctor wondered if even what appellant did remember was not put there by suggestion. He did not feel that appellant had the mental capacity to form malice aforethought (RT 957). The doctor knew what malice aforethought was because he had just looked up the term (RT 954). Nor did he feel appellant could have premeditated or deliberated (RT 957-58). The doctor elaborated:

> ". . . I think, if -- no matter who he shot or what it was, it could have been the King of England and I don't think he had any malice, he is able to have, had no forethought. He didn't plan it. I don't think the intent was there. All the testimony -- or, rather, the interrogation shows that he had very little memory, that he was not mad at everybody

--anybody, except maybe he was irritated at noise ; he was drunk, shot at the workman, maybe. . . ." (RT 958).

On cross-examination, however, the doctor said that appellant would have known he had a gun (RT 963). He did a lot of normal things -- he didn't resist or hide; he knew he was watching a ballgame. He got the gun from a closet and loaded it (RT 965). He might know he was firing the gun (RT 975). He would not be able to deceive (RT 994). He would be shooting at something that irritated him (RT 997). He fired at noise, pounding on the door (RT 999).

REBUTTAL:

Nathaniel Showstack was qualified as a psychiatrist, Director of Clinical Services at the California Medical Facility, a psychiatric prison hospital for the Department of Corrections (RT 1044). He had engaged extensively in the treatment of alcoholics (RT 1045). A person in the condition described would know he had a gun and would know it was a lethal weapon (RT 1048). The doctor concluded that apppellant was able to reason under the influence of alcohol, with some impairment from the high alcoholic content of the blood (RT 1049).

"A Well, when he shot at the Mexican workers next door, he said he didn't mean to kill them, he just wanted to scare them. Even though his reasoning may have been impaired by the alcohol, he seemed to know what he was doing. And then when he said that he was sorry that he killed the police

Officer Trapp, who ultimately became the victim, used the loudspeaker of the police car public address system, several times calling to defendant that they were officers that the house was surrounded, and for defendant to come out. Upon defendant's failure to appear, officer Trapp knocked on defendant's rear door, and again announced in a loud voice that they were officers and for defendant to come out unarmed. Officer Jacobs, in uniform, opened the rear door. Defendant, sitting on a couch with a rifle on his lap, raised his rifle and pointed it at Jacobs. Jacobs left the door, and Trapp moved in a wide arc towards the front of the house. Officer Runyon was standing near the front door. As Trapp came into view in the front yard, defendant fired and killed Trapp. Again one of the officers called for defendant to come out with his hands up, that an officer had been hit.

"Officer Roach then attempted to enter a window in the rear bedroom, calling to defendant: 'I am a police officer. Drop the gun.' Roach was in uniform. Defendant again fired the rifle. Roach felt a sting in his left hand, but whether it was struck by a bullet or by flying glass is not made clear by the record. Several shots were fired by the officers. Defendant then called, 'Don't shoot, don't kill me, I surrender.' He came to the screen door with his hands up, repeating the same or similar words. He was then again ordered to come out slowly, and he complied. Defendant was placed under arrest, the house was immediately searched, and defendant was found to be the sole occupant. Two rifles, partly loaded, and several expended shells were found on the floor.

"In the police car on the way to the police station, defendant said, 'I know what I have done and I am sorry.' He also repeated over and over 'I didn't mean to kill that police officer, honestly, believe, I know what I have done, but I had no intentions of doing it. I know what will happen to me, I'm done.' Later he stated he was shooting at some construction workers who were dumping

trash in his yard. Still later, defendant was interrogated at length and at the close of the interrogation, a tape recording was made of questions and answers purporting to amount to a summation of the facts developed by the interrogation. On stipulation of both counsel, this tape recording and a transcription thereof were placed in evidence. A second tape recording of another interrogation was also placed in evidence on stipulation of both counsel.

"The chief defense was a claim of intoxication to the extent of inability to form intent. There is little doubt that defendant had, in fact, imbibed considerable intoxicating liquor. However, the evidence as to the extent of his intoxication and his understanding of what he was doing is in substantial conflict." 192 Cal.App.2d, at 668-669.

Among the issues raised on appeal was the contention that it was error to admit into evidence the two tape recordings and other evidence of his statements to the police during interrogation, because they were not voluntary statements but statements made while appellant was intoxicated. The appellate court found:

"That defendant may have been partially intoxicated did not make his statements inadmissible nor destroy their voluntary character. (People v. Dorman, 28 Cal.2d 846, 854 [6] [172 P.2d 686]; People v. Byrd, 42 Cal.2d 200, 211 [11] [166 P.2d 505].) Whatever truth there may be in the old proverb,'In vino veritas' the matter of intoxication as presented under the facts in ths case here at bar, clearly goes to the weight of the testimony and not to admissibility. (74 A.L.R. 1102; People v. Farrington, 140 Cal. 656, 661 [74 P.288].)" 192 Cal.App.2d at 670.

The appellate court also found that there was no overreaching on the part of the authorities. Moreover, it noted that there not only was no objection

to the recordings but that they were actually introduced on stipulation of both counsel. The police officers were not required to close their ears to the volunteered statements of an intoxicated man.

C. State habeas corpus proceedings

Appellant filed a petition for a writ of habeas corpus in the California Supreme Court on July 23, 1965, over four years after his conviction was affirmed by the California Court of Appeal. Again appellant urged that his statements were inadmissible by reason of his intoxication. The petition was denied without opinion on August 18, 1965. In re Curry, Crim. No. 9215.

D. The first federal habeas corpus proceeding

On August 30, 1965, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. The petition was entertained by the Honorable George B. Harris and the proceeding was designated Curry v. Wilson, No. 44066. An order to show cause was issued and a return thereto was duly filed by the California Attorney General, representing the warden of the state prison. Appellant was represented by retained counsel, Arnold H. Mintz (CTA 38). * The trial record was

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* Clerk's Transcript of the appeal in this Court.

lodged with the District Court.

Appellant again alleged that his pretrial statements were inadmissible by reason of his intoxication. The District Court not only found that appellant was barred from attacking the admissibility of the statements because he deliberately bypassed California's contemporaneous objection rule, but also found that appellant's partial intoxication did not make his statements inadmissible nor destroy their voluntary character. The District Court cited also Brown v. Allen, 344 U.S. 443, 457-458 (1953):

> "The fact that no weight is to be given by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. Mooney v Holohan, 294 U.S. 103; Ex parte Hawk, 321 U.S. 114. Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue. Malinske v. New York, 324 U.S. 401, 404. In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional

issues. It is not res judicata (footnote omitted)"

With the trial court record before it, the District Court specifically concurred in the California appellate court's findings that the statements were admissible and that appellant had not been denied due process of law (CTA 49-50). Appellant did not appeal the District Court's order to this Court.

E. Second federal habeas corpus proceeding

On May 5, 1966, appellant filed a second habeas corpus application in the District Court (CTA 1-35). The petition was entertained by the Honorable Alfonso J. Zirpoli, who issued an order to show cause on November 1, 1966 (CTA 36). A return was filed by appellee on December 14, 1966 (CTA 37-50). A traverse was filed by appellant's appointed counsel on February 28, 1967 (CTA 51-63). After some two hours of oral argument held on March 8, 1967, the District Court took the matter under submission.

On June 2, 1967, the District Court found that the petition raised the following issues:

1. Was appellant's constitutional right to counsel violated when incriminatory statements were taken from him and introduced in evidence at his trial?

2. Were coercive police tactics used to obtain the statements rendering the statements involuntary?

3. Did appellant's voluntary intoxication render his statements involuntary?

4. Was appellant adequately represented by his trial counsel?

5. Was the trial court constitutionally required to instruct that jury that it must consider (a) appellant's degree of intoxication and (b) the failure to warn him of his constitutional rights, in assessing the voluntariness of these statements?

The District Court found that issues 1 through 3 had been considered in appellant's first federal habeas corpus proceeding, Curry v. Wilson, No. 44066, and that findings adverse to appellant had been made. The Court, pursuant to Title 28, United States Code section 2244, refused to rehear the issues and gave its reasons for so refusing. First, the District Court found that the failure to object to the statements at the time of trial was a deliberate bypassing of California's contemporaneous objection rule; second, the District Court held that the fact of voluntary intoxication goes to the weight to be given the statements and not to their admissibility.

Addressing itself to issues 4 and 5 on the merits, the District Court said that upon review of the 1238-page transcript, it was clear that appellant's trial counsel presented an active defense in a difficult case

and that his performance, by far, was above the level that would shock the conscience and make the proceeding a mockery of justice. On issue 5, the District Court reached the following conclusion:

> "[Appellant] relies upon Haynes v. Washington, 373 U.S. 503 (1963), and Unsworth v. Gladden, supra, for the proposition that the jury must, as a matter of constitutional due process, be instructed to consider the failure to warn petitioner of his right to remain silent and his right to counsel, and further that his state of voluntary intoxication must be considered with respect to its duty to determine whether or not the statements were voluntary. Haynes does not stand for this proposition at all. The Supreme Court in that case determined on an independant review of the record that the incriminatory statements could not have been voluntary. It is further noteworthy that at the time Haynes was tried, the Washington procedure left the determination of voluntariness entirely to the jury to be determined in a general verdict. This procedure was later ruled unconstitutional in Jackson v. Denno, 378 U.S. 368 (1964). California, on the other hand, follows the 'Massachusetts rule', which requires that the judge make an initial determination of voluntariness, thus adding an additional safeguard. On the facts of this case it is also significant that petitioner's counsel did not object, but in fact stipulated to the use of most of the stateents, while in Haynes there was timely objection. Unsworth v. Gladden, supra, does contain a dictum to the effect that it would be constitutional error to fail to give a jury an instruction to give less weight to statements which are made under the influence of alcohol. This court is not in accord with that dictum, insofar as it purports to set forth a constitutional mandate and declines to apply it to the facts of this case."

The District Court thereupon concluded that appellant's contentions were without merit and denied

the petition for a writ of habeas corpus (CTA 65-68).

## APPELLANT'S SPECIFICATIONS OF ERROR

1. The District Court erred in denying the petition for a writ of habeas corpus.

2. The District Court erred in declining to hold an evidentiary hearing on the matters alleged in the petition for a writ of habeas corpus.

3. The District Court erred in holding that appellant's intoxication had no bearing on the voluntariness of appellant's confessions.

4. The district Court erred in neglecting to consider the failure of the police to advise appellant of his rights as bearing upon the voluntariness of his confessions.

5. The District Court erred in neglecting to consider appellant's injuries and certain other factors tending to weaken appellant's will as bearing upon the voluntariness of his confessions.

6. The District Court erred in failing to find, on the basis of the record, that appellant's confessions were involuntary in fact.

7. The District Court erred in finding that trial counsel's stipulation of appellant's statements into evidence was a "deliberate bypassing" of state procedure.

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5. The District Court erred in neglecting to consider appellant's injuries and certain other factors tending to weaken appellant's will as bearing upon the voluntariness of his confessions.

6. The District Court erred in failing to find, on the basis of the record, that appellant's confessions were involuntary in fact.

7. The District Court erred in finding that trial counsel's stipulation of appellant's statements into evidence was a "deliberate bypassing" of state procedure.

8. The District Court erred in holding that trial counsel's stipulation of the statements into evidence precluded federal collateral review of the actual voluntariness of the statements.

9. The District Court erred in failing to find that the jury instruction on the issue of voluntariness was erroneous as a matter of constitutional law.

10. The District Court erred in holding that the California procedure for passing upon the voluntariness of confessions insulates California instructions on this issue from federal review.

SUMMARY OF APPELLEE'S ARGUMENT

I. The District Court properly refused to rehear the allegations that appellant's incriminating statements were involuntary by reason of appellant's self-indulgence in alcoholic beverages, and that the use of such statements violated his constitutional rights even though his trial counsel stipulated to their admissibility.

II. The District Court properly held that the trial court, as a matter of due process, was not required on its own motion to instruct the jury to consider (a) appellant's voluntary intoxication, and (b) the failure of this police to advise him of his rights, in determining the voluntariness of his statements.

## ARGUMENT

### I.

### THE DISTRICT COURT JUDGE PROPERLY REFUSED TO REHEAR ALLEGATIONS PREVIOUSLY HEARD AND DECIDED BY ANOTHER DISTRICT COURT JUDGE

The District Court Judge refused to entertain appellant's contentions (1) that his constitutional right to counsel was violated when incriminatory statements were taken from him and introduced in evidence at his trial; (2) that these statements were rendered involuntary by virtue of coercive police tactics used to obtain them and that incriminatory statements made by petitioner were rendered involuntary by virtue of his voluntary intoxication; and (3) that it was constitutional error to allow them to be introduced in evidence against him. These contentions had been previously raised and decided against appellant in Curry v. Wilson, No. 44066, decided January 28, 1966.

In deciding not to rehear these issues, the District Court correctly relied upon Title 28, United States Code section 2244, which provides, in pertinent part, as follows:

> "(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a state court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent

application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

The District Court had broad discretion to dismiss the habeas corpus application where the grounds advanced for relief had already been determined against appellant on the prior application. Sanders v. United States, 373 U.S. 1, 15-17 (1963); Duncan v. Carter, 299 F.2d 179, 181-182 (9th Cir. 1962), cert. denied 370 U.S. 952 (1962); Jones v. State of Montana, 231 F. Supp. 531 (D.C. Mont. 1964).

Contentions 1 through 3 of appellant's petition were not dismissed without explanation for the District Court explicitly stated the reasons why it believed the ends of justice would not be served by rehearing the contentions. Appellant was represented with great vigor and force on the trial level, yet his experienced counsel, obviously learned in the law, deliberately and consciously abstained from making objections to the admissibility of the statements now alleged to be involuntary. This, the District Court found, was a deliberate bypassing of California's

contemporaneous objection rule. Nelson v. People, 346 F.2d 73, 77-82 (9th Cir. 1965).

No detailed analysis is necessary to understand why trial counsel did not object to the introduction of the extra judicial statements of his client. Appellant's initial statement, made upon his apprehension and while he was being placed in the police car, was: "I know what I have done and I am sorry" (RT 459). On the way to the station appellant said: "I didn't mean to kill that police officer, honestly, believe me, I know what I have done, but I had no intentions of doing it. I know what will happen to me, I'm done" (RT 536). These were the spontaneous, volunteered statements of a man caught in an act of crime and they were made without police questioning or pressure as established by trial counsel's probing cross-examination of the officer who witnessed the statements (RT 537-543). This officer witness did not know appellant was intoxicated (RT 541-542), but even if he had known, there is no requirement that officers arresting a drunk must make themselves deaf like the sailors of Ulysses passing the rocks of the Sirens. Aside from the lack of a legal ground to object, the statements were valuable to the defense, for they reflected appellant's state of mind at the time of the killing. Where the issues were whether appellant killed with premeditation and

deliberation, or whether he even had the intent to kill, the statements were definitely helpful to the defense.

The first tape recording was admitted upon stipulation (RT 476-480). It was not a confession, as appellant incorrectly asserts, but an exculpatory statement (RT 481-494). The tape is replete with accounts of appellant's drinking, assertions of faulty recollection and expression of persecution by the world generally -- factors consistent with the defense theory that appellant was incapable of formulating the intent to kill, or unable to premeditate.

The second tape recording was part of a long interview which commenced some four and one-half hours after the killing (RT 201/c - 208). It traced appellant's activities that day, his drinking and food consumption, his shooting at the construction workers, his firing at a figure through a glass door, and his mental blackout (RT 202-208). Again it was not a confession and was essentially consistent with the case of the defense, including appellant's own testimony (RT 871-885). The tape and the statements given at the interview were admitted without objection. The statements were given freely (RT 201/c - 201/d), a matter explored at length by appellant's trial counsel (RT 203-227).

Consequently, the District Court, in its

discretion, chose not to rehear the contentions that the statements were involuntary, because it was apparent from the record that trial counsel consciously abstained from making an objection to their admission. This was not an oversight. This represented counsel's considered opinion that such a claim was so devoid of merit as to be unworthy of presentation.

The second reason which the District Court gave for not rehearing appellant's contentions was the overwhelming authority contrary to appellant's assertion that his voluntary intoxication made the statements involuntary per se.

At the outset, it must be noted that there is no conflict in the record on the facts that appellant had imbibed a considerable amount of intoxicating beverages. However, the evidence as to the degree of his intoxication and of his comprehension of what he was doing was in substantial conflict at trial. Expert witnesses on the effect of alcohol were presented by both sides (RT 627-692, 935-999, 1044-1065). The resolution of the conflict was for the jury. The jury apparently found that the degree of appellant's intoxication prevented him from premeditating and deliberating but it did not preclude him from formulating the intent to kill. The verdict was a partial defense victory. The skill of defense counsel may have saved appellant's

life, for if the jury had returned a verdict of first degree murder, appellant would have been eligible for the gas chamber.

Appellant treats the issues of intoxication and voluntariness as being inextricably entwined. The law, however, does not so consider them. Where the only objection to admission of a statement is a claim of voluntary intoxication during interrogation, the law is very clear that that factor will not affect admissibility, but will bear only on the weight and credibility to be given to the statement by the jury. Mergner v. United States, 147 F.2d 572 (D.C. Cir. 1945) [1/] The only exception to the rule is where the suspect is in a state of delirium, frenzy, incoherence or uncontrollable emotion as a result of the intoxication. Cf. Doyon v. Robbins, 322 F.2d 486, 493 (1st Cir. 1963), cert. denied 376 U.S. 923 (1964). That was not the case here (RT 462, 476).

On his arrest and on the way to the police station, appellant did not appear to be intoxicated (RT 454-470). At the police station appellant appeared intoxicated but not drunk (RT 476). At one point appellant had a .257 blood alcohol level, but the officers, of course, did not know this at the time they talked to

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1. See Annotations in 69 A.L.R. 2d 361; 74 A.L.R. 1098.

him. The police officers did nothing wrong in questioning appellant to find out the circumstances under which their brother officer had been killed, even though they were aware appellant had consumed some alcohol.

Appellant cites numerous holdings where the sick, insane, young and the uneducated have been broken by prolonged and coercive interrogation. This is illustrated by Blackburn v. Alabama, 361 U.S. 199 (1960), where an 8-10 hour interrogation cracked an insane person. But intoxication and insanity are not identical. If a "most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane . . .", human emotions are not stirred by the questioning of a law-breaker under the influence of alcohol. The law has long recognized the distinction between insanity and voluntary intoxication and has given the former a preferred position as a defense to crime. Appellant's claims before the District Court of intoxication amount to contentions that he should be shielded by virtue of his own vice.

Appellant proposes a new general principle of law: any condition of a defendant which deprives him, to a substantial degree, of his powers of will and judgment renders involuntary a confession taken from him by police who choose to take advantage of his

condition to interrogate him. Yet, on its face, this proposed general principle has no application to this case. Here, the evidence as to the degree of intoxication and appellant's understanding of what he was doing was in substantial conflict; here, appellant did not make a confession; here, the officers did not take advantage of his condition, they being specifically unaware of the extent of his intoxication.

Appellant's only incriminatory statement was his admission that he fired at a figure as it passed by the other side of a glass door (RT 202). The officers testified that this admission was not made until 11:00 or 11:30 p.m., some 8 hours after the killing. Appellant's level of intoxication at this time can be computed from the information we have. We know the level was .257 at 5:05 p.m. There is testimony that the average rate of decline is .015 an hour (RT 667). From this, by subtracting .015 every hour, we can make up a table to show the alcohol level at the time the admission was made. (It should be noted that there is no likelihood that the level would increase or remain the same after 5:00 p.m., for it takes 40 to 70 minutes to ingest alcohol into the blood stream (RT 666), and the sample was taken 2 hours after the arrest. We feel it can be assumed appellant was given no intoxicants in this period.)

| Time | Blood Alcohol Level |
|---|---|
| 5:05 | .257 |
| 6:05 | .242 |
| 7:05 | .227 |
| 8:05 | .212 |
| 9:05 | .197 |
| 10:05 | .182 |
| 11:05 | .167 |
| 12:05 | .152 |
| 1:05 | .137 |
| 2:05 | .122 |

By our table we can see that the blood alcohol level at that time had reduced itself to an area of .167 to .160, hardly above the level of unsafe driving. Yet even this does not tell the full story, for it appears that appellant's rate of decline was above average. By 1:45 in the morning, by our means of computation, we would expect him to have a blood alcohol reading of .13, yet it was actually .094. We would necessarily have to assume that there was less alcohol in his blood when the admission was forthcoming. By working back from the 1:48 figure, adding to it .015 every hour, we get the following table:

| Time | Blood Alcohol Level |
|---|---|
| 1:48 | .094 |
| 12:48 | .109 |
| 11.48 | .124 |
| 10:48 | .149 |

Thus, instead of the level being between..167 to .160, it may have been down to .13 or .14, and very probably was below the .15 of being under the influence, because we are closer in time to the .094 at the close of the interview than to the 5:00 p.m. sample.

Even this does not tell the full story. For if appellant was afflicted with this much alcohol, he was under an unusual and strong stimulus to shake off its effects. All of the expert witnesses were in agreement as to this.

The effect of our analysis appears to be to minimize the influence of drink at the actual moment the admission was made. It also serves to indicate that the duration of the questioning did not work entirely against appellant, for it enabled him to sober up.

Consequently, appellant's assumption that at all times appellant's blood level remained at the level of .257 is unfounded. This is contrary to fact and far from what the jury might reasonably have determined to be the case. Nor is .257 the "extreme" of intoxication. On the contrary, it is close to the low figure (RT 627).

Appellant, in support of his position that intoxication is a factor related to the voluntariness of the statements, relies upon Unsworth v. Gladden, 261 F. Supp. 897 (D. Ore (1966), appeal docketed, No. 21738, 9th Cir.,March, 1967. Unsworth, indeed, was an extreme case. The officers awakened Unsworth from his sleep. He could not stand; he was jabbering and babbling; he was loud and aggressive. His oral statements were used against him. The District Court for the District of Oregon found that the statements he made were, "' the product of a mind benumbed or confused by alcohol, made at a time when the defendant himself had no understanding or realization of what was going on or what he was saying', and therefore were inadmissible." 261 F. Supp. at 902. The court below did not find Unsworth persuasive in the instant case because of the stipulation on the part of counsel that appellant's statements might be admitted in evidence and the court below disagreed with the conclusion that voluntary intoxication goes to the admissibility of the statements rather than to the weight to be given them.

Logner v. State of North Carolina, 260 F. Supp. 970 (M.D.N.C. 1966), cited by appellant, was also a case where the suspect was in a state of extreme intoxication due to over-indulgence in alcohol and narcotics, and was subjected to prolonged questioning by teams of

police officers. The court found that the statements made by the suspect were not the product of a rational intellect and a free will.

Both Unsworth and Logner presented situations where the suspect's intoxication amounted to mania, i.e., he was so drunk as to be unconscious of the meaning of his words. We do not have such facts in the instant case. Appellant's degree of intoxication did not render his statements inadmissible; however, his intoxication was a relevant circumstance bearing upon the credibility of the statements, a question exclusively for the jury's determination. The law does not require officers to turn a deaf ear to a suspect lest his tongue, loosened by alcohol, utter a statement he might later regret. Mergner v. United States, supra, 147 F.2d 572 (D.C. Cir. 1945), cert. denied 325 U.S. 850 (1945).

Appellant asserts that his statements were involuntary for two reasons in addition to his intoxication. First, he asserts that the police failed to advise him of his rights and, second, he was suffering from a painful injury.

Appellant's trial was completed before the June 22, 1964, decision in Escobedo v. Illinois, 378 U.S. 478 (1964). Since Johnson v. New Jersey, 384 U.S. 719 (1966), held that Escobedo was not retroactive,

the alleged failure to warn appellant of his right to remain silent and right to counsel is insufficient to hold the statements inadmissible. Miranda v. Arizona, 384 U.S. 436 (1966), is likewise inapplicable. Moreover, appellant clearly indicated to the authorities that he did not want a lawyer even when the officers urged that he get one (RT 493).

"Q. You have to have a lawyer.

"A. I don't have to have a lawyer.

"Q. Yes, in a case like this, you do.

"A. I don't want one . . . ."

Appellant's injury was a small abrasion on the forehead (RT 785-786). Appellant merely described his head as "throbbing" and "skinned" (RT 871, 989). The officers noticed only a slight abrasion on his forehead (RT 466, 476, 538). Appellant's own witness, a medical doctor, described the condition as superficial, "an abrasion, just a scrape on the skin. There was no cut." (RT 785, 787).

The District Court, of course, dismissed appellant's contentions of involuntariness on the ground that they had been previously heard and decided. Nevertheless, the District Court had the trial record before it and found no basis in fact or law to rehear the same issues. A review of these facts and law makes it absolutely clear that the District Court

did not abuse its discretion in dismissing appellant's contentions 1 through 3.

II.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY

The trial court in this case correctly instructed the jury on the differences between confessions and admissions (CT 72). It then proceeded to give standard instructions relating to the necessary voluntariness of confessions or admissions (CT 73-74). The instructions were proposed by the prosecution. The defense had made no objection to appellant's statements on the ground of involuntariness.

In Jackson v. Denno, 378 U.S. 368 (1964), the Supreme Court established a constitutional rule requiring a trial judge to make an independent determination regarding the voluntariness of a confession before the confession is submitted to the jury. While the jury could constitutionally be permitted again to pass upon the voluntariness issue, it was not to hear the confession until the trial judge had made an independent determination of its voluntariness.

California adopted that procedure many years ago. See, e.g., People v. Gonzales, 24 Cal.2d 870, 876-877, 151 Pac. 2d 251 (1944). In light of the instructions to the jury given by the trial judge here, and in light of the presumption of correctness attributable to the

acts of public officials in the absence of evidence to the contrary, it is clear that the trial court here actually was satisfied that appellant's statements were voluntary and could be considered by the jury. The trial court instructed the jury in part as follows:

> "The law absolutely forbids you to consider a confession or admission in determining the innocence or guilt of a defendant unless the confession or admission was voluntarily made, and although the Court has admitted evidence tending to show that defendant made a confession or admission, you must disregard it entirely unless you, yourselves, by your own weighing of all the evidence, your own judging of the credibility of witnesses, and your own reasonable deductions, conclude that the alleged confession or admission not only was made, but was voluntary." (Emphasis added.) (CT 73).

There is no testimony in this record that any form of coercion, physical or psychological, was used to induce appellant to make his statements. In the absence of objection by counsel, the statements were clearly voluntary as a matter of law and could have gone to the jury under any circumstances. Since there was no question raised at trial to the voluntariness of the statements, it was not even necessary for the trial court to make a preliminary finding and instruct as it did. The trial court, however, chose a course with which appellant should have no complaint. There is no constitutional requirement that the jury decide the

question of voluntariness. [2].

Appellant, nevertheless, argues that the trial judge did not go far enough in his instructions even though no alternative instructions were proposed by his trial counsel. See People v. Starkey, 234 Cal.App. 2d 822, 829, 44 Cal.Rptr. 738 (1965). Appellant contends that the jury should have been instructed to consider the failure and warn him of his right to remain silent and his right to counsel, and to consider his voluntary intoxication in determining the voluntariness of his confession.

There are, of course, many factors which interplay in a question of voluntariness, among them being the declarant's age, educational background, emotional stability, conditions of incarceration, and length of interrogation. Payne v. Arkansas, 356 U.S. 560, U.S. 315, 321-325 (1958); Crooker v. California, 357 U.S. 433, 438 (1958); Blackburn v. Alabama, supra, 361 U.S. 199, 207-208 (1960); Thomas v. Arizona, 356 U.S. 390, 401 (1958). We are aware, however, of no requirement that the jury be instructed on every conceivable factor which might bear on the issue of whether the statements

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2. California law now places the final responsibility of determining admissibility on the trial judge and the jury is not given the opportunity to redetermine the issue. California Evidence Code sections 400-406.

were extorted by physical or mental coercion.

A deliberate attempt to mislead a suspect about his rights, or deliberate refusal to advise him of his rights, or the deliberate denial of his right to outside assistance may, in a given case, be factors relevant to the voluntariness of a statement. Johnson v. New Jersey, supra, 384 U.S. 719 (1966); Davis v. North Carolina, 384 U.S. 737, 746 (1966); Sessions v. Wilson, 372 F.2d 366, 369 (9th Cir. 1967); Gladden v. Holland, 366 F.2d 580, 582-583 (9th Cir. 1966). The instruction given in this case did not preclude the jury from considering such additional factors. The jury was merely instructed that it could find appellant's statements voluntary even though he was under arrest at the time, was not represented by counsel, was not told that any statement could or would be used against him, and was told that others had made statements against him (CT 74). To the best of our knowledge, this is still an accurate statement of the law. Stroble v. California, 343 U.S. 181, 189 (1951). Appellant's statement that "the jury was unqualifiedly told that the failure of the police to advise appellant of his rights should not be considered as contributing to the involuntariness of his confessions" is manifestly inaccurate (Appellant's Opening Brief, p. 21).

Appellant's contention that the jury should have been instructed to consider appellant's voluntary

intoxication in determining the voluntariness of his statement has already been discussed. The fact of voluntary intoxication goes to the weight to be given the statements, not to their admissibility.

In summary, this issue is a false issue. First, there was no objection to the statements as being involuntary or coerced. Second, the statements, in the absence of any objection or any evidence of coercion, were voluntary as a matter of law. Third, there was no constitutional mandate in this case to instruct the jury on voluntariness. Finally, even though it was not necessary to instruct the jury on voluntariness, the jury was instructed and accurately so.

## III.

## APPELLANT'S OTHER CONTENTIONS ARE WITHOUT MERIT

Appellant contends that an evidentiary hearing is required to determine whether trial counsel's stipulations of the statements into evidence was a deliberate bypassing of state procedures (Appellant's Opening Brief, p. 25). Of course, as already noted, the District Court declined to entertain the issue of voluntariness because the issue had already been decided against appellant in an earlier federal proceeding. The District Court had discretion to rehear the issue and one of the

reasons for its refusal to exercise its discretion was the deliberate failure of trial counsel to object to the admission of the statements. Where there is not only a failure to object after extensive voir dire and cross-examination of the testifying police officers, but also stipulations to the admissibility of the statements, it is inconceivable that conduct of counsel could be anything other than deliberate.

Appellant suggests that counsel acted under "serious error of California law" but fails to specify what this error was (Appellant's Opening Brief, pp. 25-26). While the petition for a writ of habeas corpus attacked the competency of trial counsel, this contention was abandoned at the hearing in the District Court (Appellant's Opening Brief, p. 8), and is not raised on this appeal. Appellant fails to indicate why he believes the trial record was inadequate for the District Court's determination of the question of deliberate bypassing.

Appellant inaccurately states that the failure to object to the admission of incriminating statements into evidence in no way limits the scope of the federal review of the voluntariness of the statements. Federal review of constitutional questions is limited where there is no contemporanious objection. Schmerber v. California, 384 U.S. 757, 765, fn. 9 (1965); Henry v. Mississippi, 379 U.S. 443, 448 (1965); Fay v. Noia,

372 U.S. 391, 438-439 (1963); Nelson v. People, 346 F.2d 73, 77-82 (9th Cir. 1965).

Appellant appears to argue that at the time of his trial, California, while purporting to follow the "Massachusetts" rule of giving the jury an opportunity to consider voluntariness after the trial judge has made a preliminary finding and admitted the evidence, actually followed the now unconstitutional "New York" rule because the jury played "the major, if not the only, role in determining the voluntariness of confessions" (Appellant's Opening Brief, pp. 29-35). Consequently, appellant argues, the District Court erred in finding that the appellant had the additional "safeguard" of a preliminary judicial determination of voluntariness. Appellant is in error. California at this time clearly required a judicial determination of voluntariness before the question could be submitted to a jury. People v. Trout, 54 Cal.2d 576, 354 P.2d 231 (1960); People v. Gonzales, supra, 24 Cal.2d 870, 151 P.2d 251 (1944); People v. Jones, 24 Cal.2d 601, 150 P.2d 801 (1944). Now the California procedure for determining the admissibility of a statement is the same as the procedure for determining the admissibility of physical evidence claimed to have been seized in violation of constitutional guaranties.

In this case, even in the absence of objection by counsel, the trial judge's satisfaction with

the legal admissibility of appellant's statements is underscored by the fact that he permitted the defense to explore all aspects of the police role in the taking of the statements and all facets of appellant's physical condition during the presentation of the prosecution's case.

Moreover, where the California Court of Appeal, by written opinion resolved on the merits the factual issue of voluntariness, there is a presumption that its findings are correct. Title 28, United States Code section 2254(d). Scrutiny of the state court record establishes that the state court's determination on this issue is fairly supported by the record. See Townsend v. Sain, 372 U.S. 293, 316 (1963); Culombe v. Connecticut, 367 U.S. 568, 603 (1961).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the petition for a writ of habeas corpus should be affirmed.

DATED: November 8, 1967.

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## CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 8, 1967.

JOHN T. MURPHY
Deputy Attorney General